

**Florida's Request To Assume Administration of a Clean Water Act Section 404 Program
(85 FR 57853, September 16, 2020) EPA-HQ-OW-2018-0640**

Code 10 Endangered Species Act (ESA)

Florida assumption of the Section 404 program will adequately protect Endangered Species

Commenters (0416-A4, 0420-A2, 0429-Justin Wolfe) stated their support for Florida's assumption of the Section 404 program, asserting that it will be protective of the State's fish and wildlife species and the environment. Commenters (0416-A4, 0429-Justin Wolfe) expressed that Florida's approach, and the threatened and endangered species and their habitats, would benefit from Endangered Species Act (ESA) consultations at the front end of the process, which does not bypass species protection. Another commenter (0420-A2) emphasized that the Florida FWS is committed to working with FL DEP to ensure Florida's 404 program is successful and protective of Florida's wildlife and that the comprehensive process embodied in the anticipated programmatic biological opinion provides for meaningful engagement among the federal and state agencies and protection of federally listed species and their designated critical habitats. Another commenter (0429-Justin Wolfe) noted that FLDEP's agreements with USACE, USEPA, USFWS, and FLFWC ensure a robust program that provides full protection for our state's wetlands and species. This commenter concluded by affirming that Florida's program will go above and beyond the requirements of federal law and ensure more robust protections for our state's threatened or endangered species.

Florida application has not demonstrated how assumption of the Section 404 program will ensure compliance with the Endangered Species Act

Numerous commenters expressed opposition to Florida's Assumption of the CWA 404 Program, citing both general and specific concerns about how state assumption would impact compliance with the ESA. Multiple commenters (approximately 294) submitted a form letter (form letter 0514-A1) asserting that the state of Florida's application is incomplete and does not provide complete details about how state agencies would handle threatened and endangered species under the Florida Assumption. In a different form letter (form letter 0515-A1), commenters (approximately 333) emphasized that the state of Florida's wetlands deserve protection, and that a transfer of oversight to the state of Florida without clear assurance on how wildlife impacts will be addressed jeopardizes protections currently in place.

Commenters (0081-A1, 0141-A1, 0220, 0224, and 0225) noted that Florida is home to more endangered species than New Jersey and Michigan, the only other states that have assumed 404 programs, and expressed concern that the State's assumption of responsibilities for CWA Section 404 programs would impact compliance with the ESA and be likely to "result in less time and expertise involved in the analysis of project impacts on vulnerable wildlife."

Commenters (0221, 0066-A2, 0066-A3, 0222-A1, 0221-A2, 0386-A1, 0430-Amber Crooks, Chris Pettit, Allison Kelly, Faith Bickner) opposed the state's proposed rules to assume

jurisdiction over the federal wetlands permitting authority, stating that Florida has not adequately addressed how it will ensure protection of endangered species and maintain the stringent levels of review that are provided by ESA. Commenter (0430-Faith Bickner) contested that the proposed program would illegitimately circumvent the requirements of the ESA, including duty to consult with USFWS and NOAA Fisheries.

Commenter (0211-A2) noted that the proposal stated that FL DEP permit reviewers will rely on information from the Florida Fish and Wildlife Conservation Commission, but that this agency has not been granted additional resources to take on the new task of evaluating wetland development permits.

FL Assumption does not ensure that it can achieve the no-jeopardy mandate with respect to species and critical habitat

Commenters (0346-A1, 0386-A1, 0051-A1, 0429-Lindsey Dublin, Kent Wimmer) asserted that the FL Assumption does not demonstrate that it can achieve the CWA's no-jeopardy mandate with respect to listed species. These four commenters stated that the proposal does not provide reviewers enough information to make a decision regarding FLDEP's ability to comply with the Section 404(b)(1) Guidelines' no-jeopardy provision with respect to the engagement process and protection of species under the Endangered Species Act. Two of these commenters (0346-A1, 0386-A1) also noted that, "to the extent that FDEP limits its consideration of Section 404 permit authorizations to the Assumed Waters, the agency cannot ensure that it would be capable of achieving the no-jeopardy mandate with respect to species and critical habitat in Retained Waters that are in the action area downstream from the permitted activity." Commenter (0430-Kent Wimmer) added that the FLDEP lacks the resources to implement the program and cannot be expected to ensure Section 404 permit compliance.

Commenters (0051-A1, 0429-Lindsey Dublin) added that the lack of a final MOU between EPA and FLDEP, and between FLDEP, USFWS, and the National Marine Fisheries Services, on ESA matters renders the application incomplete, and interferes with affected parties ability to provide comment on whether Florida will be able to meet the Section 404(b)(1) no-jeopardy requirements. The commenter pointed to statements from an August 27, 2020 EPA memorandum, Memorandum on Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals, which specify that the Section 7 consultation, programmatic biological opinion, and incidental intake statement are essential components of the application that must be considered prior to determining the program submission is complete. One commenter (0429-Lindsey Dublin) requested that EPA suspend consideration of the Assumption package until commenters may weigh in on the full application, including the biological opinion and incidental take statement (ITS), and whether or not Florida will be able to achieve the no-jeopardy mandate.

Commenters (0346-A1, 0429-Lindsey Dublin, Kent Wimmer) expressed that a statewide "one-size-fits-all" ITS that provides FLDEP with "near blanket authorization" to exempt Section 404 permit applicants from the ESA's take prohibition would violate the Endangered Species Act. Commenter (0346-A1) stated that an ITS of this nature would likely provide no limits on take, or provide woefully inadequate limits to trigger re-initiation of consultation.

The Biological Assessment fails to be as protective as the current federal process

One commenter (0386-A1) contended that the Biological Assessment “fails to be as protective as the current federal process,” noting that “the Biological Assessment fails to provide site-specific information, thereby preventing the intended state implementing agencies (FDEP and the Florida Fish and Wildlife Conservation Commission (FWCC)) from even determining the effect of various specific permitting actions” and “the Biological Assessment provides very limited—almost nonexistent—information about the cumulative impacts of the State’s assumption program.” The commenter stated that FDEP’s application does not contain the Biological Assessment or the criteria for such. The commenter asserted that the Biological Assessment fails to adequately address the environmental baseline, status of the species, effects of the action, or reasonable and prudent measures designed to reduce any take identified, and contains other flaws, including lack of information on what constitutes “suitable habitat;” an unreasonably short timeframe for USFWS to decide if it will comment; FDEP and FWCC will make effect determinations and assume no comment from USFWS if there is silence (no duty to check); and designation of the key deer and red cockaded woodpecker as not regularly utilizing wetlands despite their state or county wetland dependent designations. The commenter (0386-A1) stated that the overarching programmatic consultation, particularly with these flaws, does not relieve the state of its responsibility to determine at the site-specific permit level whether there will be no jeopardy to listed species prior to the issuance of permits. Another commenter (0209-A2) expressed concern that that “use of a Programmatic Biological Opinion between FDEP and the FWS and between FDEP and the NMFS is wholly inadequate to protect vulnerable ESA threatened and endangered plant and animal species from Section 404 authorized developmental impacts.” This commenter concluded that this alone should disqualify FDEP from Section 404 program assumption.

Commenter (0386-A1) added that flaws in EPA’s Section 7 consultation process render any potential resulting Programmatic Biological Opinion insufficient. The commenter argued that the National Marine Fisheries Services erred in failing to consider the entire area that will be affected by Florida’s assumption and not engaging in the Section 7 consultation. The commenter contended that NMFS is merely “assum[ing] that the EPA will make a ‘no effect’ determination for NMFS’ ESA-listed species that were originally identified as part of this proposed assumption,” based on NMFS’ recent determination that “Endangered Species Act (ESA)-listed species under NMFS’ jurisdiction do not occur in waters that are assumable by the state.” The commenter urged that Section 7 consultation must occur for species and critical habitat that are in the “action area” and “action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” The commenter stated that without consulting NMFS, there will be no consideration of whether the no-jeopardy mandate in the Clean Water Act’s Section 404(b)(1) guidelines is achievable for NMFS’ species experiencing downstream impacts.

Florida Assumption will result in reduced protection for endangered species and other species

Commenters (0425-A2, 0429-Christina Reichert) warned that Florida’s assumption of CWA Section 404 program would result in reduced protection for endangered species, stressing that

Florida's endangered species "cannot afford to lose the protection of federal laws that are triggered when federal agencies operate the 404 program." These commenters noted that the "Federal operation of the 404 program triggers a myriad of other federal protections, including:" the Endangered Species Act, the Magnuson-Stevens Act that protects the essential fish habitat in our world-class fisheries, the National Environmental Policy Act, and the National Historic Preservation Act, which protects our historical and cultural resources.

Commenters (0348-A1, 0369, 0399) observed that Florida contains many unique environments that provide critical habitat for hundreds of species that, although not endangered, could become endangered if development is allowed to proceed as a result of Florida's taking over regulation of the Clean Water Act and the Endangered Species Act.

One commenter (0224) expressed concern that, if the federal Fish and Wildlife Coordination Act were replaced with a patchwork of memoranda of understanding between federal and state agencies, this would remove accountability for this vital public responsibility.

Finally, one commenter (0429-Eric Hughes) asserted that compliance with the Endangered Species Act was in itself inadequate.

Code 10a ESA - EPA oversight of permits with potential ESA species

Commenters expressed concern about whether the state program would conform to the Section 404(b)(1) guidelines to protect specific species, and questioned the legal liability of a programmatic consultation for assumption that would cover all permits the state issues.

One commenter (0346-A1) asserted that "the state has failed to demonstrate that its program would conform to the CWA's 404 permitting regulations, "the 404(b)(1) Guidelines," with respect to matters involving ESA-listed species." This commenter warned that improper management of the program and failure to consider the entire action area affected by state assumption during ESA consultation would endanger the Florida Panther, the Florida bonneted bat, and the Everglades snail kite due to habitat loss and fragmentation.

Commenter (0430-Chris Farrell) asked that the state take more time to consider the liability for take of listed species from projects with state permits. This commenter questioned the suggestion by the state that a programmatic consultation for assumption would cover all permits the state issues, asserting that "This is an incredibly controversial legal statement and has not been given sufficient time for a review, and it would most certainly be tested in court." This commenter noted that EPA has never considered programmatic consultations to be part of the assumption process until a few months ago, and that, in cases where they were used by USFWS, they "were used to facilitate the permitting of repeated actions that have similar and predictable impacts." This commenter observed that the "404 program deals with an incredibly wide variety of projects and potential impacts, ones that cannot be captured in a programmatic fashion" and concluded that legal actions could be taken against permittees for incidental take if "the legal argument that a programmatic review protects all permits falls through," which could lead to a regulatory program more burdensome than the existing federal program.

Code 10b ESA - Coordination process during permit review (other than EPA oversight matters)

Commenters were concerned about the coordination between agencies during the permit review process.

One commenter (0212-A2) observed that the requirements of the Fish and Wildlife Coordination Act will be split among multiple agencies. The commenter contends that the state program's numerous Memoranda of Understanding prepared between the USEPA, USACE, FDEP, USFWS, FL Water Management Districts, and the FL Wildlife Commission (FWC) only serve to obscure the accountability for protection of listed species. This commenter also noted that the Florida Legislature gave no additional authority to state agencies to protect endangered and threatened species.

Another commenter (0346-A1) stated that FDEP's proposed technical assistance process is not modeled on the structured Section 7 consultation process that is legally required by the ESA, and further "fails to provide specific information about how and to what extent the [US Fish and Wildlife] Service will review permits that FDEP and FWC choose to share with it." The commenter observed that, instead of delineating specific mandatory actions, the proposal asserts that the USFWS will provide 'comments' on permit applications, that FDEP will 'coordinate' with other agencies regarding concerns raised at public hearings, and that it is 'anticipated' that the FLDEP will participate in 'unspecified trainings,' create 'unspecified evaluation tools,' 'assisting' with determining species impacts, and developing habitat conservation or species management 'opportunities.'